Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

3

NO. 96-1940

In The SUPREME COURT OF THE UNITED STATES
October Term, 1996

The Jaques Admiralty Law Firm, *Petitioner*

v.

Argo International Corp., *et al.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

GREGG L. SPYRIDON, *Counsel of Record*
EDMUND S. LATOUR
SPYRIDON, KOCH, WALLACE & PALERMO
Three Lakeway Center, Suite 3010
3838 North Causeway Boulevard
Metairie, Louisiana 70002
Telephone: (504) 830-7800

Attorneys for Respondents

---

35 pp

I.
PARTIES TO THE LITIGATION

Respondents on this brief were awarded fees and costs in the lower court as part of the award to ACandS, Inc. *et al.*

1. The following Respondents on this brief have no parents or nonwholly-owned subsidiaries:

Auburn Manufacturing Co.
A.B. Boyd Co.
Bryan Steam Corp.
Gatke Corporation
Hajoca Corporation
Janos Industrial Insulation
Morrison Bros. Co.
Noland Company
Pecora Chemical Corporation
Phoenix Specialty Mfg. Co.
Resco Products, Inc.
Zimmerman Packing & Mfg., Inc.

2. Respondents on this brief which have parents and/or nonwholly-owned subsidiaries include:

Argo International Corp.
    Delcal Enterprises, Inc.
Carborundum, Inc., now known as Unifrax Corporation
    Kirtland Capital Partners LP
    Unifrax Holding Company
Goodall Rubber Co.
    Trelleborg AB
    Trelleborg Corporation
    Trelleborg Industries, Inc.

II.
TABLE OF CONTENTS

Page

I. Parties to the Litigation i

II. Table of Contents ii

III. Table of Authorities iii

IV. Clarification of Facts 1

V. Argument 2

A. The 1994 amendment to Fed. R. App. P. 38 does not control a request for sanctions filed before its effective date 3

B. There was no "just and practicable" reason for the Ninth Circuit to apply the amendment to Fed. R. App. P. 38 retroactively. 5

C. The Ninth Circuit's assessment of sanctions under Fed. R. App. P. 38 satisfied due process 7

D. This case is not appropriate for review by this Court. 9

VI. Conclusion 10

III.
TABLE OF AUTHORITIES

Cases **Page**

Amwest Mortgage Corp. v. Grady, 925 F.2d 1162 (9th Cir. 1991) 6

Baulch v. Johns, 70 F.3d 813 (5th Cir. 1995) 8

Boddie v. Conn, 401 U.S. 371 (1971) 9

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) ... 2,8

Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985) 8

Finch v. Hughes Aircraft Co., 926 F.2d 1574 (Fed. Cir. 1991) 8

Hatch v. Reliance Ins. Co., 758 F.2d 409 (9th Cir.), *cert. denied*, 474 U.S. 1021 (1985) 3,8

Hill v. Norfolk & Western Ry., 814 F.2d 1192 (7th Cir. 1987) 8

Hirschfeld v. Bd. of Elections in New York, 984 F.2d 35 (2d Cir. 1993) 8

In Re Cosmopolitan Aviation Corp., 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985) 2

Landgraf v. USI Film Products, 511 U.S. 244 (1994) . 4,5,10

Link v. Wabash R. R. Co., 370 U.S. 626 (1962) 7,8

Roadway Exp. Inc. v. Piper, 447 U.S. 752 (1980) 8,9

Simmons v. Allstate Life Ins. Co., 65 F.3d 526 (6th Cir. 1995) 3,4

Thomas E. Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682 (2d Cir. 1989) 8

Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985) 8

Other

Fed. R. App. P. Rule 38 ..... *passim*

Fed. R. Civ. P. 60(b) 7

Order of the United States Supreme Court Amending the Federal Rules of Appellate Procedure, 511 U.S. 1157 (1994) 1,3,4

IV.
CLARIFICATION OF FACTS

Petitioner contends that its due process rights were violated when the Ninth Circuit imposed sanctions without complying with Fed. R. App. P. 38, as amended. The amended language of Fed. R. App. P. Rule 38, upon which Petitioner relies, became effective on December 1, 1994,[1] after Petitioner had filed its notice of appeal with the Ninth Circuit and after requests for sanctions were filed.

Petitioner filed two notices of appeal in the United States Court of Appeals for the Ninth Circuit on April 14, 1994 and April 15, 1994.[2] Petitioner was notified that the Ninth Circuit was considering sanctions when it was served with Respondent Owens-Illinois, Inc.'s two briefs on or around October 3, 1994. (Pet., pp. App. 55-68). Petitioner failed to respond to the request for sanctions in its two reply briefs filed on or around October 31, 1994. (App. 1). The Ninth Circuit properly applied the law as it existed when the appeal and later request for sanctions were filed.

---

[1]Order of the United States Supreme Court Amending the Federal Rules of Appellate Procedure, 511 U.S. 1157 (1994) ("Order").

[2]Two notices of appeal were filed as there were two underlying actions known by their lead plaintiffs, Norman D. Abar and Creighton E. Miller as alleged administrator of the estate of Isaac W. Abraham. Thus, Petitioner filed two briefs and reply briefs in the Ninth Circuit, and Respondent Owens-Illinois, Inc. filed two response briefs in which it requested sanctions. (*See* Pet., pp. App. 55-68).

V.
ARGUMENT

The sole Question Presented for Review is whether Petitioner was denied due process by the Ninth Circuit's failure "to provide or require proper notice prior to imposition of appellate sanctions." (Pet., p. i).[3]

Petitioner presents three grounds for the grant of a Writ of Certiorari by this Court:

1. The Ninth Circuit's assessment of sanctions in the underlying case was contrary to the decisions of the other courts of appeal which have applied Fed. R. App. P. 38, as amended;

2. The Ninth Circuit departed from the accepted and usual course of judicial proceedings; and

3. This Court should decide whether the courts of appeal must strictly comply with the procedural provisions of Fed. R. App. P. 38, as amended. (Pet., pp. 7-8).

---

[3]Petitioner chose to abandon the alternative relief requested in its Motion to Vacate or, in the Alternative, for a Statement of Reasons and Opportunity to Respond (Pet., pp. App. 69-76). In any case, the Ninth Circuit's discussion of the merits of the appeal in its Memorandum provides adequate explanation of the basis for the imposition of sanctions. *See Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987); *In Re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985). Moreover, Petitioner had adequate opportunity to respond to the imposition of sanctions in its Reply Briefs filed in the Ninth Circuit on or around October 31, 1994, yet ignored the issue entirely. (App. 1).

These bases for the grant of Certiorari are inapposite since amended Fed. R. App. P. 38 does not apply to the facts presented in the petition. Moreover, the Ninth Circuit's assessment of appellate sanctions in this case was appropriate and well within the normal bounds of judicial proceedings.

A. The 1994 amendment to Fed. R. App. P. 38 does not control a request for sanctions filed before its effective date.

Petitioner filed its notice of appeal in the Ninth Circuit in April of 1994. At that time, Fed. R. App. P. 38 provided as follows:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.[4]

By Order dated April 29, 1994, this Honorable Court amended, *inter alia*, Fed. R. App. P. 38 to include the phrase "after a separately filed motion or notice from the court and reasonable opportunity to respond." The Order further provided:

> [T]he foregoing Amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases *thereafter* commenced and, *insofar as just and*

---

[4]Fed. R. App. P. 38 (1967); *see also, Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir.), *cert. denied*, 474 U.S. 1021 (1985); *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526, 531 n. 3 (6th Cir. 1995).

> *practicable*, all proceedings in appellate cases then pending.[5]

Thus, on its face, the amendment to Fed. R. App. P. 38 applies *only* to appeals commenced on or after December 1, 1994, and *may* apply to pending proceedings if "just and practicable."[6]

It is undisputed that Petitioner's notices of appeal were filed on April 14, 1994 and April 15, 1994 and the briefs requesting sanctions were filed on or around October 3, 1994. Because these events took place before the amendment to Fed. R. App. P. 38 became effective, a separately filed motion was not required.[7] Although Fed. R. App. P. 38 is considered "procedural," this in and of itself does not trigger a retroactive application of the amendment.[8] As reflected by the Order, the Ninth Circuit was not required to comply with amended Fed. R. App. P. 38 before imposing sanctions in this case. Petitioner's argument in this regard is simply without merit.

---

[5]511 U.S. 1157 (emphasis added).

[6]*See Landgraf v. USI Film Products*, 511 U.S. 244, 275 n. 29 (1994).

[7]*See e.g., Simmons*, 65 F.3d at 531 (Since the brief in which sanctions were requested was filed prior to the effective date of amended Rule 38, the court could address the request for sanctions even though a separate motion was not filed).

[8]*See Landgraf, supra* note 6.

B. There was no "just and practicable" reason for the Ninth Circuit to apply the amendment to Fed. R. App. P. 38 retroactively.

The Order allows appellate courts to apply the amendment to Fed. R. App. P. 38 to actions pending before them, if doing so is "just and practicable." These words, "just and practicable," have been given particular meaning by this Court. In *Landgraf v. USI Film Products*, the Court considered the retroactivity of changes in procedural rules. Therein the Court stated:

> Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions [to pending cases] ordinarily depends on the posture of the particular case. *See, e.g.*, Order Amending Federal Rules of Criminal Procedure, 495 U.S. 969 (1990) (amendments applicable to pending cases "insofar as just and practicable"); Order Amending Federal Rules of Civil Procedure, 456 U.S. 1015 (1982) (same).[9]

Thus, the federal courts, when considering amendments to procedural rules, may assess for themselves the propriety of applying these changes to cases pending on their dockets. As the Committee note to the original Rule states:

> [D]amages are awarded by the court *in its discretion* in the case of a frivolous appeal as a

---

[9] *Id.*

> matter of justice to the appellee and as a penalty against the appellant.[10]

In the instant case, the Ninth Circuit exercised its vast discretion in declining to apply amended Fed. R. App. P. 38 to Petitioner's patently frivolous appeal.

As the facts herein demonstrate, there has been no abuse of discretion by the lower court. Petitioner received actual notice of the request for sanctions in at least two of the opposition briefs filed by respondents in the Ninth Circuit. (Pet., pp. App. 58-59, 65-66). In addition, Petitioner is a sophisticated law firm which represents clients with respect to various matters of law. As legal counsel, Petitioner knew that it must review all pleadings and briefs to fully protect itself and the interests of its clients and file appropriate responses. In this case, sanctions were clearly requested.[11] Interestingly, Petitioner *does not* argue that it was unaware of the request for sanctions in the Owens-Illinois briefs, only that the request of which it had notice did not comply with the amendment to Fed. R. App. P. 38. Under such circumstances, the lower court

---

[10]Advisory Committee Note to Fed. R. App. P. 38 (1967) (emphasis added). *See also Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991)("It is within this Court's discretion to impose sanctions for a frivolous appeal").

[11]For example, the section of the Owens-Illinois brief in which sanctions were requested was not an insignificant part of the brief. As the reproduction of the brief in the appendix to the petition makes clear, that particular section comprised almost one and one-half pages of the brief (between 5% and 10% of the full length of the brief). (Pet., pp. App. 58-59). The table of contents, Section V(C)(1), also clearly indicated to Petitioner that sanctions were being requested. (Pet., p. App. 56). Moreover, the brief contained a separate heading devoted to the request for sanctions (Pet, pp. App. 56, 58) and cited Fed. R. App. P. 38 in the list of authorities.

committed no abuse of discretion in declining to apply the amendment to Fed. R. App. P. 38.

Moreover, a person's knowledge of the consequences of his or her own conduct may satisfy the notice requirements of due process,[12] in which case no additional notice should be needed. As the Ninth Circuit noted in its Memorandum, Petitioner failed to adequately plead under the Federal Rules of Civil Procedure and failed to correct its pleadings when given an opportunity to do so by the District Court. Second, instead of following the normal path of appeal, Petitioner chose to challenge the District Court's dismissal order under Fed. R. Civ. P. 60(b)(6), which requires a showing of extraordinary circumstances preventing the filing of a direct appeal. (Pet., p. App. 5). Finally, Petitioner failed to demonstrate any extraordinary circumstances and simply repeated its legal arguments as the basis for Rule 60(b)(6) relief. Thus, by its own actions, petitioner had ample notice of the possibility of sanctions by the Ninth Circuit for filing its appeal.

Under these facts, where Petitioner received ample notice of the imposition of sanctions by the lower court, there is no "just and practicable" reason to apply amended Fed. R. App. P. 38 to this case. The lower court did not abuse its discretion in declining to require additional notice.

C. The Ninth Circuit's assessment of sanctions under Fed. R. App. P. 38 satisfied due process.

There is neither one set of circumstances that will always result in the imposition of sanctions nor particular levels at which sanctions will be assessed. Rather, the level of

---

[12] *Link v. Wabash R. R. Co.*, 370 U.S. 626, 632 (1962).

sanctions imposed depends upon the particular conduct to be sanctioned. In turn, what process is due prior to the imposition of sanctions depends upon the level of sanctions to be assessed.[13] Before the amendment of Fed. R. App. P. 38, while the courts required satisfaction of due process in order to impose sanctions,[14] no particular form of notice was required.[15] Thus, a request for sanctions in an opponent's brief was sufficient notice that the court was considering imposing sanctions.[16] The notice requirements of due process were

---

[13] *Roadway Exp. Inc. v. Piper*, 447 U.S. 752, 767 n. 14 (1980).

[14] *Id.* at 767.

[15] *See Link*, 370 U.S. at 632 (Not every order entered without notice and hearing offends due process; adequacy of notice and hearing depends to a considerable extent on party's knowledge of consequences of conduct); *Hirschfeld v. Bd. of Elections in New York*, 984 F.2d 35, 40 (2d Cir. 1993) (Raising issue of sanctions in responding papers provided clear notice); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 688 (2d Cir. 1989) (Proceedings sufficient to satisfy due process); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 571 (3d Cir. 1985) (Presence of statute, federal rule, ethical canon, local rule or custom, court order, or court admonition would satisfy notice requirement); *Baulch v. Johns*, 70 F.3d 813, 817-18 (5th Cir. 1995) (Counsel received adequate notice where opposing brief raised issue of frivolous appeal and counsel questioned at oral argument); *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1202 (7th Cir. 1987) (Text of Fed. R. App. P. 38 and previous decisions of the Seventh Circuit applying Fed. R. App. P. 38 constituted adequate notice); *Hatch*, 758 F.2d at 416 (Sanctions need not be sought to be awarded); *Braley*, 832 F.2d at 1514-15 (Request for sanctions in a brief where party to be sanctioned is identified satisfies notice requirements); *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1583 (Fed. Cir. 1991) (No notice in addition to request for sanctions in opposing brief required); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1178 (D.C. Cir. 1985) (Briefs on appeal sufficient to satisfy due process concerns).

[16] *See supra* note 15: *Hirschfeld*, 984 F.2d at 40; *Baulch*, 70 F.3d at 817-18; *Braley*, 832 F.2d at 1514-15; *Finch*, 926 F.2d at 1583; *Westmoreland*, 770 F.2d at 1178.

clearly satisfied herein as sanctions were requested in at least two of the opposition briefs filed in the Ninth Circuit.

The second prong of the due process inquiry is the opportunity to be heard.[17] This second prong focuses on whether the person against whom sanctions are assessed had the "opportunity" to be heard on the imposition of sanctions. Thus, the question is not whether the person has *actually* been heard, but whether the person had the *opportunity* to be heard.[18] Petitioner did not raise this issue in its Questions Presented for Review. Moreover, although Petitioner was permitted to file a reply brief in the lower court, it intentionally and blatantly ignored the request for sanctions. (App. 1). Petitioner had ample opportunity to be heard on the request for sanctions and cannot now complain that it was denied due process.

D. This case is not appropriate for review by this Court.

Even if Petitioner's case has any merit, which Respondents deny, Petitioner's argument for the Court's grant of a Writ of Certiorari is unpersuasive. This case is simply inappropriate for review by the Court.

The retroactive application of the 1994 amendment to Fed. R. App. P. 38 affects only appeals which were pending in the United States Courts of Appeals prior to December 1, 1994. Since such cases are likely to be very small in number as of this date and continually decreasing in number, a decision on the issue will have little, if any, precedential value.

---

[17] *Roadway Exp.*, 447 U.S. at 767.

[18] *Boddie v. Conn.*, 401 U.S. 371, 378-79 (1971).

Petitioner alleges a split in the Appellate Courts on the application of Fed. R. App. P. 38 as amended as further proof of the alleged injustice perpetrated upon Petitioner by the Ninth Circuit. However, there is no split in the Appellate Courts on the mandatory application of Fed. R. App. P. 38. All the courts are applying Fed. R. App. P. 38 uniformly to appeals which have commenced since its effective date; Petitioner cites no authority to the contrary.

With regard to the discretionary application of the 1994 amendment to pending cases, Petitioner's contention that there is a split in the Appellate Courts is also without merit. As discussed *supra*, retroactive application of the amendment is discretionary; therefore, whether the amendment is applied to a pending case by a particular court is within the discretion of that court and depends on the unique facts of the case.[19] In short, there is no sound basis here for granting a Writ of Certiorari.

VI.
CONCLUSION

For the reasons stated herein, the petition for a Writ of Certiorari should be denied. The imposition of sanctions was in accordance with the language of Fed. R. App. P. 38 in effect at the time the appeal was filed. No circumstances exist to retroactively apply the 1994 amendment to this case, and the lower court was well within its discretion in declining to do so. Moreover, the Ninth Circuit's imposition of sanctions against

---

[19]*See Landgraf, supra* note 9 and accompanying text.

Petitioner satisfied the requirements of due process. Finally, even if Petitioner's argument has any merit, which is denied, this case is inappropriate for review by this Court.

Respectfully submitted,
Spyridon, Koch, Wallace & Palermo

GREGG L. SPYRIDON
EDMUND S. LATOUR
Counsel for Respondents